

1 THOSE SIMILARLY SITUATED, ROSA JULIETA A DE PUJALS, INDIVIDUALLY
2 AND IN THEIR REPRESENTATIVE CAPACITIES FOR ALL THOSE SIMILARLY
3 SITUATED, MARIDOM LIMITED, A FOREIGN CORPORATION, RICARDO
4 LOPEZ, STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS)
5 LIMITED, STANCHART SECURITIES INTERNATIONAL, INC., MARIA AKRIBY
6 VALLADOLID, RICARDO RODRIGUEZ CASO, WONG YUK HING DE LOU,
7 MOISES LOU MARTINEZ, JOAQUINA TERESA BARBACHA HERRERO, SAND
8 OVERSEAS LIMITEDSAND OVERSEAS LIMITED, BLOCKBEND LTD,
9 EASTFORK ASSETS LTD, GERICO INVESTMENTS, INC., ALICIA GAVIRIA
10 RIVERA, EDUARDO CHILD ESCOBAR, MAILAND INEVSTMENT INC.,
11 ARJAN MOHANDAS BHATIA, TRADWAVES, LTD., PARASRAM DARYANI,
12 NEELAM P. DARYANI, VIKAS P. DARYANI, NIKESH P. DARYANI,
13 ASHOKKUMAR DAMODARDAS RAIPANCHOLIA, PRERNA VINOD
14 UTTAMCHANDANI, KISHIN MOHANDAS BHATIA, SURESH M. BHATIA,
15 BHARAT MOHANDAS, AARVEE LTD., KISHU NATHURMAL
16 UTTAMCHANDANI, VANDNA PATEL, RAJESHKUMAR DAMODARDAS
17 RAIPANCHOLIA, DILIP DAMODARDAS RAIPANCHOLIA,RAJENDRAKUMAR
18 PATEL, SECURITIES & INVESTMENT COMPANY BAHRAIN, HAREL
19 INSURANCE COMPANY, LTD., AXA PRIVATE MANAGEMENT,
20 ST. STEPHEN'S SCHOOL, PACIFIC WEST HEALTH MEDICAL CENTER, INC.
21 EMPLOYEE'S RETIREMENT TRUST, PASHA S. ANWAR, ON BEHALF OF
22 THEMSELVES AND ALL OTHERS SIMILARLY SITUATED INVESTORS IN THE
23 GREENWICH SENTRY, L.P. PRIVATE INVESTMENT LIMITED PARTNERSHIP,
24 JULIA ANWAR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY
25 SITUATED INVESTORS IN THE GREENWICH SENTRY, L.P. PRIVATE
26 INVESTMENT LIMITED PARTNERSHIP, INTERAMERICAN TRUST,
27 ELVIRA 1950 TRUST, BONAIRE LIMITED, CARLOS GAUCH, WALL STREET
28 SECURITIES, S.A., BANCO GENERAL, S.A., HARVEST DAWN
29 INTERNATIONAL INC., EL PRADO TRADING, OMAWA INVESTMENT
30 CORPORATION, CARMEL VENTURES LTD., TRACONCORP, BLYTHEL
31 ASSOCIATED CORP., MARREKESH RESOURCES, CENTRO INSPECTION
32 AGENCY, KALANDAR INTERNATIONAL, LANDVILLE CAPITAL

1 MANAGEMENT S.A., 20/20 INVESTMENTS, AXA PRIVATE MANAGEMENT
2 DIVERSIFIED INVESTMENTS ASSOCIATES CLASS A UNITS, ABR CAPITAL
3 FIXED OPTION/INCOME STRATEGIC FUND LP, HAREL INVESTMENT AND
4 FINANCIAL SERVICES LTD ., GOPAL BHATIA, THE KNIGHT SERVICES
5 HOLDINGS LIMITED, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY
6 SITUATED,

7
8 *Plaintiffs-Appellees,*

9
10 *v.*

11
12 CORINA NOEL PIEDRAHITA, WALTER M. NOEL, JR., ANDRES
13 PIEDRAHITA, JEFFREY TUCKER, AMIT VIGAYVERGIA, FAIRFIELD
14 HEATHCLIFF CAPITAL LLC, YANKO DELLAW SCHIAVA, PHILIP TOUB,
15 LOURDES BARRENECHE, CORNELIS BOELE, VIANNEY D'HENDECOURT,
16 HAROLD GREISMAN, JACQUELINE HARARY, DAVID HORN, RICHARD
17 LANDSBERGER, DAVID LIPTON, JULIA LUONGO, MARK MCKEEFRY,
18 MARIA TERESA PULIDO MENDOZO, CHARLES MURPHY, SANTIAGO
19 REYES, ANDREW SMITH, FAIRFIELD GREENWICH (BERMUDA) LIMITED,
20 FAIRFIELD GREENWICH ADVISORS, L.L.C., DANIEL LIPTON, ROBERT
21 BLUM, GREGORY BOWES, FAIRFIELD RISK SERVICES LTD., FAIRFIELD
22 GREENWICH LIMITED, A CAYMAN ISLAND COMPANY, FAIRFIELD
23 GREENWICH GROUP, FAIRFIELD GREENWICH (BERMUDA) LTD.,

24
25 *Defendants-Appellees,*

26
27 *v.*

28
29 CITCO FUND SERVICES (EUROPE) B.V., PRICEWATERHOUSECOOPERS
30 L.L.P., CITCO FUND SERVICES (BERMUDA) LIMITED, THE CITCO GROUP
31 LIMITED, CITCO BANK NEDERLAND N.V. DUBLIN BRANCH, CITCO

1 CANADA INC., PRICEWATERHOUSECOOPERS ACCOUNTANTS N.V., CITGO
2 GLOBAL CUSTODY N.V.,

3
4 *Defendants-Appellants,*

5
6 *v.*

7
8 1-20 JOHN DOES, BRIAN FRANCOUER, PRICEWATERHOUSECOOPERS
9 BERMUDA, IAN PILGRIM, PRICEWATERHOUSECOOPERS ACCOUNTANTS
10 NETHERLANDS N.V., LION FAIRFIELD CAPITAL MANAGEMENT LIMITED,
11 CARLOS GADALA-MARIA, RAUL MAS, ROBERT FRIEDMAN, RODOLFO
12 PAGES, JOHN G. DUTKOWSKI, LUISA SERENA, MIGUEL CALVO, SAMUEL
13 PERRUCHOU, EFG CAPITAL INTERNATIONAL CORP., MATTHEW C.
14 BROWN, GLOBEOP FINANCIAL SERVICES LLC., GREENWICH SENTRY,
15 L.P., FAIRFIELD SENTRY LIMITED, PRICEWATERHOUSECOOPERS
16 INTERNATIONAL LIMITED, PRICEWATERHOUSECOOPERS LLP (US),
17 PRICEWATERHOUSECOOPERS LLP CHARTERED ACCOUNTANTS,
18 FAIRFIELD INTERNATIONAL MANAGERS, INC., STANDARD CHARTERED
19 PLC, AMERICAN EXPRESS BANK LTD, STANDARD CHARTERED PRIVATE
20 BANK, STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS)
21 LIMITED, STANDARD CHARTERED BANK, STANDARD CHARTERED BANK
22 INTERNATIONAL (AMERICAS) LIMITED, FAIRFIELD GREENWICH CORP.,

23
24 *Defendants.*¹

25
26
27

¹ The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above

1 Appeal from the United States District Court
2 for the Southern District of New York.
3 No. 9-CV-118 — Victor Marrero, *Judge*.

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6 ARGUED: NOVEMBER 22, 2013

7 DECIDED: JUNE 26, 2014

8
9
10 Before: JACOBS, PARKER, AND CHIN, *Circuit Judges*.

11
12 An appeal from a judgment of the United States District Court
13 for the Southern District of New York (Marrero, *J.*) approving the
14 settlement of putative class action securities claims against certain
15 defendants over the objections of non-settling defendants.
16 Dismissed.

17
18 DAVID A. BARRETT (HOWARD L. VICKERY, II,
19 STUART H. SINGER, CARLOS SIRES, SASHI BACH
20 BORUCHOW, Boies, Schiller & Flexner LLP; ROBERT
21 C. FINKEL, JAMES A. HARROD, Wolf Popper LLP;
22 CHRISTOPHER LOVELL, VICTOR E. STEWART, Lovell
23 Stewart Halebian Jacobson LLP, *on the brief*),
24 Boies, Schiller & Flexner LLP, New York, NY, *for*
25 *Plaintiffs-Appellees*.

26 MARK G. CUNHA, Simpson Thacher & Bartlett
27 LLP, New York, NY, *for Defendants-Appellees*.

CHRISTOPHER LANDAU (TIMOTHY A. DUFFY, EMILY P. HUGHES, Kirkland & Ellis LLP; WILLIAM R. MAGUIRE, SARAH L. CAVE, Hughes Hubbard & Reed LLP; WALTER RIEMAN, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *on the brief*) Kirkland & Ellis LLP, Washington, DC, *for Defendants-Appellants*.

BARRINGTON D. PARKER, *Circuit Judge*:

This appeal requires us once again to grapple with the aftermath of the Ponzi scheme run by Bernard L. Madoff. Defendants-Appellants PricewaterhouseCoopers and Citco² (collectively, the “Non-Settling Defendants”) seek to overturn a partial final judgment entered in the United States District Court for the Southern District of New York (Marrero, J.) approving the settlement of certain putative class action claims. The settled claims were brought by Plaintiffs-Appellees (the “Investor Plaintiffs”) who were individual and institutional investors in so-called Madoff feeder funds managed by the Fairfield Greenwich Group.³ The claims were brought against the Group as well as its directors and

² “PricewaterhouseCoopers” consists of defendants PricewaterhouseCoopers LLP [Canada] and PricewaterhouseCoopers Accountants Netherlands N.V. “Citco” consists of defendants Citco Fund Services (Europe) B.V., Citco (Canada) Inc., Citco Bank Nederland N.V. Dublin Branch, Citco Global Custody N.V., Citco Fund Services (Bermuda) Ltd., and The Citco Group Limited.

³ The Fairfield Greenwich Group includes funds managed by Fairfield Greenwich (Bermuda) Limited, Fairfield Greenwich Advisors, L.L.C., Fairfield Risk Services LTD., Fairfield Greenwich Limited, Fairfield Greenwich Group, Fairfield Greenwich (Bermuda) LTD.

1 GlobeOp Financial Services, LLC,⁴ which provided various
 2 professional services to the funds. In addition to restitution of the \$5
 3 billion Investor Plaintiffs alleged that they, as a class lost, as a result
 4 of Madoff's fraudulent scheme, the complaint sought consequential
 5 and punitive damages as well as disgorgement of profits
 6 purportedly obtained by the defendants.

7 Following protracted motion practice,⁵ the Investor Plaintiffs
 8 and the Fairfield Greenwich Defendants engaged in settlement
 9 negotiations and in November 2012 moved for the preliminary
 10 approval of a settlement they had reached. The settlement
 11 purported to resolve all claims between the Investor Plaintiffs and
 12 the Fairfield Greenwich Defendants.

13 As Plaintiffs' motion for class certification had not been
 14 adjudicated,⁶ the proposed preliminary approval order defined a
 15 settlement class (the "Settlement Class")⁷ and provided that its
 16 members had the right to request exclusion from the class. The

⁴ Defendant GlobeOp Financial Services, LLC has entered into its own settlement with Plaintiffs. *See* Dist Ct. No. 09-118, Dkt. 1232.

⁵ *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 354 (S.D.N.Y. 2010); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010).

⁶ In February 2013, the district court granted in part and denied in part Plaintiffs' motion for class certification, excluding from the class investors in 25 countries, which it found had not been shown likely to give preclusive effect to an opt-out class judgment. *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105, 121 (S.D.N.Y. 2013). This court recently vacated the class certification order as to claims against the Non-Settling Defendants and remanded for further findings on the Rule 23 requirements as they pertain to the claims asserted against each of the Non-Settling Defendants. *See Anwar v. Fairfield Greenwich Ltd.*, Nos. 13-2340, 13-2345, 2014 U.S. App. LEXIS 11515 (June 19, 2014).

⁷ The Settlement Class was defined principally as "all Persons who were Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 (whether as holders of record or traceable to a shareholder or limited partner account of record) and who suffered a Net Loss of principal invested in the Funds." *See* Joint App'x 273.

1 proposed order also provided that those investors who wished to
2 remain in the class could file proofs of claim in order to share in the
3 distribution of the settlement proceeds.

4 Paragraph 17 of the proposed order further provided that
5 Settlement Class members who filed proofs of claim would submit
6 to the district court's jurisdiction as follows:

7 Any Settlement Class Member who submits a Request for
8 Exclusion or a Proof of Claim thereby submits to the
9 jurisdiction of the Court with respect to the subject matter
10 thereof and all determinations made by the Court thereon.

11 Joint App'x 311 ¶ 17.

12 Following the filing of the motion for preliminary approval of
13 the settlement, the putative class representatives were approached
14 by several putative Settlement Class members who expressed
15 concern that, as foreign individuals and entities, participation in the
16 Settlement Class could subject them to clawback actions in United
17 States courts by Irving Picard, the SIPC Trustee for Bernard L.
18 Madoff Investment Securities, LLC, and Kenneth Krys, the court-
19 appointed Liquidator of Fairfield Sentry Ltd., seeking to recover
20 monies they may have directly or indirectly received through the
21 Fairfield Greenwich Group from Madoff. In response to these
22 concerns, on the eve of the preliminary approval hearing, the
23 settling parties submitted an amended proposed order purporting to
24 limit the district court's jurisdiction over Settlement Class members.
25 Paragraph 17 of the preliminary approval order was amended to
26 state in relevant part:

27 [A]ny Settlement Class Member who submits a Proof of
28 Claim thereby submits to the jurisdiction of this Court with

1 respect only to the subject matter of such Proof of Claim and
2 all determinations made by this Court thereon *and shall not*
3 *be deemed to have submitted to the jurisdiction of this Court*
4 *or of any court in the United States for any other matter on*
5 *account of such submission.*

6 Joint App'x 415 ¶ 17 (emphasis added).

7 At the hearing, the Non-Settling Defendants objected to the
8 amended language on the ground that class members who
9 submitted to the court's jurisdiction in order to accept the terms of
10 the settlement could not, at the same time, be permitted to limit the
11 legal consequences of doing so. The Non-Settling Defendants
12 contended that they were currently facing claims in litigation in the
13 Netherlands and were entitled to argue that any entity that
14 participated in the New York settlement could not pursue claims in
15 any other jurisdiction. The district court overruled the objections
16 and approved the amended preliminary settlement order.

17 Following the end of the notice period, the Investor Plaintiffs
18 moved for final approval of the settlement. Over the objections of
19 the Non-Settling Defendants, the district court entered the final
20 order approving the settlement and entering partial final judgment
21 with respect to Investor Plaintiffs' claims against the Fairfield
22 Greenwich Defendants (the "Final Order"). Paragraph 28 of the
23 Final Order contained language identical to paragraph 17 of the
24 amended preliminary order providing that Settlement Class
25 members who submit proofs of claim only submit to the jurisdiction
26 of the district court with respect to the subject matter of the proof of
27 claim. Special App'x 13. This appeal followed.

II.

Plaintiffs contend that the Non-Settling Defendants do not have standing to appeal the Final Order. The question of standing is a “threshold determinant[] of the propriety of judicial intervention.” *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Although we generally review a district court’s approval of a settlement for abuse of discretion, *McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009), we review *de novo* the issue of whether the Non-Settling Defendants have standing to bring this appeal, see *Denney v. Deutsche Bank AG*, 443 F.3d 253, 262 (2d Cir. 2006); *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir. 2004).

Over the years, the Supreme Court has articulated the standard by which the “irreducible constitutional minimum of standing” is established. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U. S. ___, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A party must have suffered an injury-in-fact, that is, the invasion of a “legally protected interest” in a manner that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U. S. at 560 (internal quotation marks omitted). Moreover, the injury must be “fairly traceable” to the alleged conduct and it must be likely that the injury will be redressed by a favorable decision. *Id.* at 560-61.

The standing requirements ensure that judicial resources are “devoted to those disputes in which the parties have a concrete stake.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000). Consequently, we have observed that a non-settling defendant generally lacks standing to object to a court order approving a partial settlement because a non-settling defendant is

1 ordinarily not affected by such a settlement. *Zupnick v. Fogel*, 989
2 F.2d 93, 98 (2d Cir. 1993). This rule advances the policy of
3 encouraging the voluntary settlement of lawsuits. *See id.*; *Waller v.*
4 *Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987).

5 However, there is a recognized exception to this general rule
6 which permits a non-settling defendant to object where it can
7 demonstrate that it will sustain some formal legal prejudice as a
8 result of the settlement. *Zupnik*, 989 F.2d at 98; *see also Smith v.*
9 *Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005); *Weinman v.*
10 *Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 262 F.3d
11 1089, 1102 (10th Cir. 2001); *In re Vitamins Antitrust Class Actions*, 215
12 F.3d 26, 31 (D.C. Cir. 2000); *Eichenholtz v. Brennan*, 52 F.3d 478, 482
13 (3d Cir. 1995); *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247-48
14 (7th Cir. 1992).

15 The Non-Settling Defendants contend that paragraph 28 of the
16 Final Order causes them such prejudice because it “*effectively* strips
17 them of defenses against the settling plaintiffs in other fora,
18 including defenses based on duplicative litigation and preclusion.”
19 Brief of Defendants-Appellants (“App. Br”) at 11 (emphasis added).
20 This allegation, however, does not rise to the required level of formal
21 legal prejudice necessary for standing. That level exists only in those
22 rare circumstances when, for example, the settlement agreement
23 *formally* strips a non-settling party of a legal claim or cause of action,
24 such as a cross-claim for contribution or indemnification, invalidates
25 a non-settling party’s contract rights, or the right to present relevant
26 evidence at a trial. *See Denney*, 443 F.3d at 273 (reviewing challenge
27 where settlement included a bar order prohibiting claims against
28 settling defendants); *Gerber v. MTC Elec. Techs. Co., Ltd.*, 329 F.3d 297,
29 305 (2d. Cir. 2003); *see also Alumax Mill Prods., Inc. v. Congress Fin.*
30 *Corp.*, 912 F.2d 996, 1002 (8th Cir. 1990) (finding standing where

1 settlement dismissed cross-claims with prejudice); *Dunn v. Sears,*
2 *Roebuck & Co.*, 639 F.2d 1171, 1173–74 (5th Cir. 1981) (reviewing
3 challenge where settlement made potential witnesses unavailable to
4 remaining defendants).

5 Nothing in the Final Order precludes the Non-Settling
6 Defendants from asserting in the district court or in other litigation
7 any claims or defenses that may be available to them. Similarly,
8 nothing in that order requires that they forbear from asserting in the
9 Dutch proceedings, or in any future proceedings in other courts, that
10 participation in the settlement approved by the district court bars
11 subsequent or parallel proceedings. *See Zupnick*, 989 F.2d at 98-99
12 (expressing skepticism that non-settling defendants claims were
13 foreclosed where the stipulations of settlement purported to
14 extinguish “any and all claims . . . that have been, could have been,
15 or in the future might be asserted” by non-settling defendants,
16 because the agreements were not binding on them). The Non-
17 Settling Defendants implicitly concede as much stating: “Paragraph
18 28 *undercuts* that argument, as well as appellants’ ability to invoke
19 preclusion defenses in the Dutch actions (or any other actions) based
20 on the outcome of this case.” App. Br. at 13 (emphasis added). It is
21 not, however, sufficient for the Non-Settling Defendants to show
22 that they were somehow “undercut” through the loss of some
23 practical or strategic advantage. As we have stated, to succeed they
24 must show formal legal prejudice. They have not done so.

25 Finally, we note that the Non-Settling Defendants have
26 already invoked the “preclusion defenses” in the Dutch proceedings.
27 To us, that is a significant demonstration that nothing in the Final
28 Order prevents or limits them from continuing to assert that
29 Settlement Class members’ participation in the settlement bars,
30 limits, or otherwise impacts claims against them in other

1 jurisdictions. Moreover, in any proceedings to which they are
2 proper parties, the Non-Settling Defendants are free to argue that
3 paragraph 28 of the Final Order is invalid and lacks preclusive effect
4 against them.

5 In reaching this result, we join our sister courts in holding that
6 a settlement which does not prevent the later assertion of a non-
7 settling party's claims (although it may spawn additional litigation
8 to vindicate such claims), does not cause the non-settling party
9 "formal" legal prejudice. *See, e.g., Agretti*, 982 F.2d at 247-48
10 (concluding that a party did not have standing to challenge a
11 settlement agreement in which a co-defendant agreed to declare the
12 contract void because the non-settling party retained the right to
13 assert that the contract was valid and enforceable, despite the
14 obvious practical burden of having its contractual partner disavow
15 the contract); *New Mexico ex rel. Energy & Minerals Dep't v. U.S. Dep't*
16 *of Interior*, 820 F.2d 441, 444-45 (D.C. Cir. 1987) (holding that the
17 Navajo Tribe's challenge to a provision of a settlement which
18 purported to clarify the Secretary's position on whether allotments
19 to individual Indians of lands which lie outside the undisputed
20 boundaries of the Navajo Reservation were "Indian lands" was
21 properly dismissed because the Tribe was not bound by the
22 settlement and the Tribe could raise their legal objections in
23 subsequent litigation).

24 For these reasons, we conclude that the Non-Settling
25 Defendants do not have standing to object to the settlement. In view
26 of this conclusion, we decline to address the remaining issues
27 argued on appeal.

28 CONCLUSION

29 We dismiss the appeal for lack of standing.